

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT KNOXVILLE

Assigned on Briefs October 15, 2008

STATE OF TENNESSEE v. CLARENCE EDWARD MCCALED

**Direct Appeal from the Criminal Court for Knox County
No. 80705 Kenneth F. Irvine, Jr., Judge**

No. E2008-00521-CCA-R3-CD - Filed March 4, 2009

The defendant, Clarence Edward McCaleb, was convicted of two counts of aggravated rape (Class A felonies), two counts of aggravated robbery (Class B felonies), and two counts of aggravated burglary (Class C felonies). He received a total effective sentence of life plus thirty years. On appeal, the defendant argues that: the evidence was insufficient to support his convictions; his convictions should have been merged; and he was sentenced improperly. After careful review, we conclude that the evidence was sufficient to support the defendant's convictions and find no reversible error in the defendant's sentences. However, some of the defendant's convictions should have been merged, and we remand that single issue to the trial court.

**Tenn. R. App. P. 3 Appeal as of Right; Judgments of the Criminal Court Affirmed in Part
and Remanded**

JOHN EVERETT WILLIAMS, J., delivered the opinion of the court, in which JERRY L. SMITH and ROBERT W. WEDEMEYER, JJ., joined.

J. Liddell Kirk (on appeal) and Steve Sams (at trial), Knoxville, Tennessee, for the appellant, Clarence Edward McCaleb.

Robert E. Cooper, Jr., Attorney General and Reporter; Leslie E. Price, Assistant Attorney General; Randall E. Nichols, District Attorney General; and Philip Morton, Assistant District Attorney General, for the appellee, State of Tennessee.

OPINION

This case involves a fifty-six-year-old victim and a forty-year-old defendant. The defendant was convicted of entering the victim's home at night and committing two counts of aggravated rape, two counts of aggravated robbery, and two counts of aggravated burglary therein.

At trial, the victim testified that she was living in an apartment complex in Knoxville with two of her grandchildren when the incident occurred. The victim testified that she left work around 12:15 or 12:30 a.m., picked up her grandchildren from her daughter's apartment, and went home.

The incident occurred on September 24, 2004. She said that she put her grandchildren to bed and turned out the light in their room. The victim testified that she went to sleep around 2:00 a.m., wearing a nightgown and underwear. The victim said that she had a feeling that “something was there” in her apartment. She said that she keeps her bedroom door cracked open while she sleeps to “listen-out for the babies.”

The victim sensed light was coming from her grandchildren’s room. As she was trying to wake up, she saw an outline of someone at her door. The victim testified that there was a black male at her door wearing a hat. She said that he pushed her back on the bed when she tried to get up. The victim said that the man hit her with something and held her to the bed. She believed he used a knife because the object was sharp and had “a gleam.”

The victim testified that the man held her down on the bed with one of his knees while he held her down with his hand. He told her, “[D]on’t scream, don’t get up” and “give me all your money. Where is it? Give it all.” She said that she had about fifty dollars in cash on the dresser in her bedroom. The victim testified that she was scared of the man and the knife.

After the defendant took her money, he told her to “[l]ay back down” and then pushed her down. She said he removed her underwear and proceeded to rape her. The victim said that she experienced pain when the defendant raped her. She said that the rape lasted about five minutes, but the defendant did not ejaculate. The defendant tried to put his penis in the victim’s mouth. In the end, the defendant pleased himself while he was over the victim. The victim went to the bathroom, and the defendant followed. He would not allow her to shut the door. The victim identified the defendant as the man who raped and robbed her.

The defendant eventually ran from the apartment, and the victim called her daughter and 9-1-1. The police and an ambulance responded to her call. The victim underwent an intensive examination at the hospital. A detective from the police department showed her a photograph lineup, and she identified the defendant. The victim testified that she did not give the defendant permission to enter her home, take her money, or penetrate her sexually.

The victim testified that the police found a steak fork in her bedroom. She said that the fork was not in her room when she went to bed and that it was kept in her kitchen.

During cross-examination, the victim testified that she wears eyeglasses because she is farsighted but she was not wearing them during the incident. The victim said that the detective wrote: “This is the man who raped me and robbed me” on the photograph of the defendant after she selected his picture. She said that she did not recall taking her eyeglasses to the hospital but said she could clearly see the photographs. The victim denied that she knew the defendant.

Next, an officer with the Knoxville Police Department testified that he responded to a call in the early morning hours of September 5, 2004. He said that the call was related to a burglary and rape. The officer found the victim inside her apartment and described her as agitated, upset, and

crying. The victim told the officer that she had been awakened by someone slapping her in the face. The statement was recorded by the officer and played for the jury.

The officer testified that the dispatch described the suspect as a black male wearing a blue shirt. A suspect matching that description was observed entering an apartment at the complex, and the officer went to that location and knocked on the door. The occupant of the apartment gave the officer permission to enter the apartment and look for the suspect. The officer found the suspect hiding between the mattress and box springs of a bed, arrested him, and transported him to the police department. The officer identified the suspect as the defendant.

A criminal investigator with the Knoxville Police Department testified that he responded to the victim's apartment on the morning of September 5, 2004. He said that the victim had already been transported to the hospital when he arrived. The investigator said that they found no useable fingerprints in the victim's home. The detective assembled a photographic lineup that included a recent photograph of the defendant and went to the hospital. He spoke to the victim at the hospital and recalled that she was "extremely upset." The victim told the investigator that a man came into her bedroom, threatened to kill her, asked her for money, and raped her. The victim told the investigator that she got away from the defendant by telling him she had to check on her grandchildren. She described the man as a black male with a beard, mustache, or goatee and wearing a blue shirt and shorts.

The investigator testified that the victim immediately picked the defendant out of the photographic lineup. The investigator circled the defendant's photograph and wrote down what the victim told him.

The next witness to testify said that she was a sexual assault nurse examiner, formerly with the Sexual Assault Crisis Center in Knoxville. She testified that she interviewed and examined the victim at the University of Tennessee Hospital. The victim told her that she had been awakened in her bed by someone coming through her bedroom door. The examiner said the victim told her that the man pushed her onto the bed and demanded money. The victim told her that she gave the man her money and that he then removed her underwear and vaginally penetrated her. The assailant wanted the victim to perform oral sex on him, but she told him her mouth hurt. The victim tried to escape to the bathroom, but he followed her. The victim told the man she needed to check on her grandchildren, and he eventually left her home.

The examiner testified that the victim had an abrasion on her right temple, an area of tenderness on the left side of her forehead, and a reddened area on the right side of her neck. The examiner said she found several instances of trauma on the victim's genitalia. The victim's vagina was red and tender, and there was a one-half centimeter abrasion at the base of her vagina. The examiner opined that the victim's injuries were consistent with penile penetration and forcible rape.

The examiner testified that the medical report contained a clerical error indicating that the victim had not been vaginally penetrated. She maintained that the mark was an error and that her

handwritten notes clearly indicated that the victim had been vaginally penetrated.

A Special Agent Forensic Scientist with the Tennessee Bureau of Investigation testified that there was no semen present on the victim's rape kit. She said this was consistent with the victim's testimony that the defendant did not ejaculate.

The defendant testified that on the day of the incident, he was "kicking and drinking" with some friends at Austin Homes. The defendant said that he was on a No Trespass List at Austin Homes. He said that he had been smoking marijuana and cocaine and drinking beer during the day. The defendant said a man knocked on the door of the apartment around 5:30 a.m., and his friend let the man into the apartment. He said that the man was breathing hard, so he asked him, "You ain't did nothing, have you?" The man went in the kitchen of the apartment and left through the back door.

The defendant testified that the police came to the door about fifteen minutes later. He said he hid because he did not want to get arrested for trespassing, or for possessing drugs or a gun. He said the police found him hiding and arrested him for trespassing. The defendant said he did not have the drugs or gun on his person when he was arrested. The defendant was wearing shorts and a blue shirt when he was arrested.

The defendant testified that he did not commit the crimes against the victim. He testified that he was high on cocaine at the time and would not have been able to perform a rape. He did acknowledge that he had been in and out of the apartment that night. The defendant acknowledged his criminal history including prior thefts, a robbery, and a burglary.

At the conclusion of the proof, the jury returned a verdict of guilty on all six counts. Following a sentencing hearing, the trial court sentenced the defendant to life on both Class A felony convictions. The trial court concluded that the defendant was a repeat violent offender. The defendant was sentenced to twenty years on each Class B felony conviction and to ten years on each Class C felony conviction. The trial court ordered that one sentence for each Class A, B, and C felony be served consecutive to each other and that all other convictions would be served concurrent to each other. The total effective sentence for the defendant was life plus thirty years.

Analysis

First, the defendant contends that the evidence was not sufficient to support his convictions. Specifically, he argues that there was no physical evidence linking him to the victim or her residence. He contends that the conviction is based entirely on the identification of the defendant by the victim and states that the victim's testimony was not credible because she told different versions of how she originally woke up and observed her assailant. The defendant concludes that the victim's recollection of events is "too suspect" to support her identification of the defendant.

When an accused challenges the sufficiency of the convicting evidence, the standard of review is “whether, after reviewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” *Jackson v. Virginia*, 443 U.S. 307, 319, ___ S. Ct. ___ (1979); *State v. Goodwin*, 143 S.W.3d 771, 775 (Tenn. 2004); *see also* Tenn. R. App. P. 13(e). “[T]he State is entitled to the strongest legitimate view of the evidence and to all reasonable and legitimate inferences that may be drawn therefrom.” *State v. Smith*, 24 S.W.3d 274, 279 (Tenn. 2000). Questions about the credibility of witnesses, the weight and value of the evidence, as well as all factual issues raised by the evidence are resolved by the trier of fact, and an appellate court does not reweigh or reevaluate the evidence. *State v. Evans*, 108 S.W.3d 231, 236 (Tenn. 2003).

A jury verdict approved by the trial court accredits the State’s witnesses and resolves all conflicts in the evidence in favor of the State. *State v. Grace*, 493 S.W.2d 474, 476 (Tenn. 1973). “Because a verdict of guilt removes the presumption of innocence and imposes a presumption of guilt, the burden shifts to the defendant upon conviction to show why the evidence is insufficient to support the verdict.” *State v. Thacker*, 164 S.W.3d 208, 221. (Tenn. 2005). These rules are applicable to findings of guilt predicated upon the direct evidence, circumstantial evidence, or a combination of both direct and circumstantial evidence. *State v. Pendergrass*, 13 S.W.3d 389, 392-93 (Tenn. Crim. App. 1999).

After viewing the evidence in the light most favorable to the State, it is evident that a rational trier of fact could have found the essential elements of aggravated rape, aggravated robbery, and aggravated burglary beyond a reasonable doubt. Aggravated rape is defined, in pertinent part, as the “unlawful sexual penetration of a victim by the defendant or the defendant by a victim” where: (1) “[f]orce or coercion is used to accomplish the act and the defendant is armed with a weapon or any article used or fashioned in a manner to lead the victim reasonably to believe it to be a weapon,” or (2) “[t]he defendant causes bodily injury to the victim.” Tenn. Code Ann. § 39-13-502(a)(1), (2). “Sexual penetration” is defined as “sexual intercourse, cunnilingus, fellatio, anal intercourse, or any other intrusion, however slight, of any part of a person’s body or of any object into the genital or anal openings of the victim’s, the defendant’s, or any other person’s body[.]” Tenn. Code Ann. § 39-13-501(7). “Bodily injury includes a cut, abrasion, bruise, burn or disfigurement, and physical pain or temporary illness or impairment of the function of a bodily member, organ, or mental faculty.” Tenn. Code Ann. § 39-11-106(a)(2).

“Aggravated robbery is robbery as defined in [Tennessee Code Annotated] § 39-13-401: (1) Accomplished with a deadly weapon or by display of any article used or fashioned to lead the victim to reasonably believe it would be a deadly weapon; or (2) Where the victim suffers serious bodily injury.” Tenn. Code Ann. § 39-13-402. “Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear.” Tenn. Code Ann. § 39-13-401.

“Aggravated burglary is burglary of a habitation as defined in [Tennessee Code Annotated] §§ 39-14-401 and 39-14-402.” Tenn. Code Ann. § 39-14-403(a). “A person commits burglary who, without the effective consent of the property owner . . . [e]nters a building and commits or attempts

to commit a felony, theft or assault.” Tenn. Code Ann. § 39-14-402(a)(3). The defendant was charged alternately with entering the building to commit a theft or a robbery. “A person commits theft of property if, with intent to deprive the owner of property, the person knowingly obtains or exercises control over the property without the owner’s effective consent.” Tenn. Code Ann. § 39-14-103. “Robbery is the intentional or knowing theft of property from the person of another by violence or putting the person in fear.” Tenn. Code Ann. § 39-13-401.

The victim testified that on the evening of September 4, 2004, she awoke to find the defendant, whom she did not know, standing in the doorway of her bedroom. The victim tried to get up, and the defendant pushed her back to the bed. The defendant hit her in the face with a sharp object, a steak fork, and demanded money. The victim gave him cash, and she testified that she was “very scared.” The victim testified the defendant pushed her back down, removed her underwear, and vaginally raped her. She called the police when the defendant left her home. The victim provided a description of the man who was in her apartment. Police located the defendant, who matched the description given by the victim, hiding between a mattress and box springs in a bedroom of a nearby apartment. The police located a steak fork near the bed in the victim’s bedroom.

The victim sustained injuries to her face, her forehead, and her genitalia. Sufficient evidence was presented at trial to show that the defendant entered the victim’s home for the purpose of committing a robbery or theft and that he did, in fact, rob the victim. The defendant accomplished the robbery by violence and by putting the victim in fear with what appeared to be a sharp object, the steak fork.

The defendant contends that the victim’s identification was not sufficient to support his conviction. “Identity is a question of fact for the determination of the jury.” *State v. Shelley*, 628 S.W.2d 436, 438 (Tenn. Crim. App. 1981); *State v. Livingston*, 607 S.W.2d 489, 491 (Tenn. Crim. App. 1980). It is the prerogative of the jury to accredit the testimony of the witness as to the identity of the defendant. *See State v. Summerall*, 926 S.W.2d 272, 275 (Tenn. Crim. App. 1995). “The credible testimony of one identification witness is sufficient to support a conviction if the witness viewed the accused under such circumstances as would permit a positive identification to be made.” *State v. Radley*, 29 S.W.3d 532, 537 (Tenn. Crim. App. 1999).

Here, when viewed in the light most favorable to the State, the victim’s testimony was sufficient to support the defendant’s convictions. Immediately after the rape, the victim identified the defendant from a photographic line-up. In court, the victim identified the defendant as the man who broke into her home, stole her money, and raped her. The victim provided the police with an accurate description of the defendant, and, a short time after the offenses, they were able to locate him hiding under a mattress in a nearby apartment. Sufficient evidence was shown to convict the defendant.

Next, the defendant argues that the trial court should have merged his convictions for counts Two, Four, and Six with the convictions in counts One, Three, and Five, respectively. The State suggests that the defendant did not raise this issue in his motion for new trial but agrees that the

offenses should have been merged. The defendant raises a double jeopardy argument on appeal and contends that the separate counts were simply alternate ways of charging the same offense.

Constitutional double jeopardy protections under the Fifth Amendment of the United States Constitution and Article I, Section Ten of the Tennessee Constitution protect against multiple punishments for the same offense. *North Carolina v. Pearce*, 395 U.S. 711, 717, ___ S. Ct. ___ (1969); *State v. Denton*, 938 S.W.2d 373, 378 (Tenn. 1996). “A single criminal episode will support multiple convictions only if the individual offenses are wholly separate and distinct.” *State v. Goins*, 705 S.W.2d 648, 650 (Tenn. 1986). The *Denton* court employed a four-part balancing inquiry to determine whether multiple convictions offend double jeopardy, under which a reviewing court must first conduct an analysis of the statutory offenses under *Blockburger v. United States*, 284 U.S. 299, ___, ___ S. Ct. ___ (1932), which provides:

[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.

State v. Goins, 938 S.W.2d at 379 (quoting *Blockburger*, 284 U.S. at 304). Second, the court must also look to the specific evidence in the case to determine whether the State used different evidence to prove the individual offenses. *Id.* at 380 (quoting *Duchac v. State*, 505 S.W.2d 237, 239 (Tenn. 1973)). Third, the court must consider whether the offenses had multiple victims or discrete acts. Fourth, the court must compare the purposes of the respective criminal statutes. *Id.* at 381. None of the four considerations are determinative; rather, the court must balance the factors in relation to each other. *Id.*

Here, the defendant was charged with and convicted of two counts of aggravated rape, two counts of aggravated robbery, and two counts of aggravated burglary. The defendant was charged with using a deadly weapon and causing bodily injury in the commission of the rape. He was charged with entering the victim’s home for the purpose of committing a theft or robbery to support the burglary charges. Under his robbery charges, he was charged with taking money from the victim by the use of violence and by putting her in fear. It is well settled that merger is appropriate in order to protect against double jeopardy when a jury convicts a defendant under alternate theories of the same offense. *State v. Hurley*, 876 S.W.2d 57, 70 (Tenn. 1993); *State v. Addison*, 973 S.W.2d 260, 267 (Tenn. Crim. App. 1997). The testimony at trial established that there was only one aggravated rape, only one aggravated robbery, and only one aggravated burglary. Therefore, the alternate theories of each crime should be merged into single convictions.

Next, the defendant argues that he was improperly sentenced. Specifically, he argues that the trial court should not have applied enhancement factors with regard to his convictions for aggravated robbery and aggravated burglary. The defendant argues that the trial court improperly applied sentencing enhancement factors in violation of *Blakely v. Washington*, 542 U.S. 296, ___ S. Ct. ___ .

The conduct underlying the defendant's convictions occurred prior to the amendments to the Criminal Sentencing Reform Act. Prior to 2005, the Criminal Sentencing Reform Act set forth a "presumptive sentence" to be imposed within an applicable range created by the Sentencing Act of 1989. A trial court "could not increase a defendant's sentence above the presumptive sentence except upon the application of statutory enhancement factors." *State v. Gomez*, 239 S.W.3d 733, 739 (Tenn. 2007). If the trial court determined that statutory enhancement factors applied, *see* Tenn. Code Ann. § 40-35-114 (2003), the trial court had the authority to increase the presumptive sentence to the maximum within the range, *see id.* § 40-35-210(d); *State v. Carter*, 254 S.W.3d 335, 342 (Tenn. 2008). The weight applied by the trial court to any enhancement and mitigating factors was left to the trial court's discretion. *Carter*, 254 S.W.3d at 342 (citing *Gomez*, 239 S.W.3d at 739-40).

After the decision in *Blakely v. Washington*, 542 U.S. 296 (2004), the Tennessee legislature amended the Criminal Sentencing Reform Act in 2005. The General Assembly amended Tennessee Code Annotated section 40-35-210(c) to state:

- (c) The court shall impose a sentence within the range of punishment, determined by whether the defendant is a mitigated, standard, persistent, career, or repeat violent offender. In imposing a specific sentence within the range of punishment, the court shall consider, but is not bound by, the following advisory sentencing guidelines:
 - (1) The minimum sentence within the range of punishment is the sentence that should be imposed, because the general assembly set the minimum length of sentence for each felony class to reflect the relative seriousness of each criminal offense in the felony classifications; and
 - (2) The sentence length within the range should be adjusted, as appropriated, by the presence or absence of mitigating and enhancement factors set out in §§ 40-35-113 and 40-35-114.

Tenn. Code Ann. § 40-35-210(c) (2006).

The trial court is free to select any sentence within the applicable sentencing range as long as the sentence is "consistent with the purposes and principles of [the Sentencing Act]." *Id.* § 40-35-210(d); *Carter*, 254 S.W.3d at 343. "Prior to 2005, a defendant was entitled to the presumptive sentence unless the trial court properly applied statutory enhancement factors. Currently, the trial court 'shall consider, but is not bound by' an 'advisory sentencing guideline' that suggests an adjustment to the defendant's sentence upon the presence or absence of mitigating and enhancement factors. *Id.* § 40-35-210(c). Thus the 2005 revision to section -210 increases the amount of discretion a trial court exercises when imposing a sentencing term." *Carter*, 254 S.W.3d at 344.

The Sentencing Act provides that, “when reviewing sentencing issues raised [by a defendant] pursuant to [this section], including the granting or denial of probation and the length of sentence, the appellate court shall conduct a *de novo* review on the record of the issues. The review shall be conducted with a presumption that the determinations made by the court from which the appeal is taken are correct.” Tenn. Code Ann. § 40-35-401(d); *see also id.* § 40-35-402(d).

The trial court enhanced the defendant’s sentence based on his prior record and several other enhancement factors specific to the separate offenses. For his aggravated robbery convictions, the trial court applied the enhancement factors for prior criminal convictions, that he treated a victim with exceptional cruelty and that he possessed or employed a deadly weapon. The State agreed that the trial court erred in applying the factors other than his prior criminal convictions because they were neither admitted by the defendant nor found by a jury beyond a reasonable doubt. *See* Tenn. Code Ann. § 40-35-117. The State argues that the defendant is limited to plain error review of his sentences because he failed to object either at sentencing or in his motion for new trial.

The Tennessee Supreme Court in *State v. Gomez*, 239 S.W.3d 733 (Tenn. 2007), held that a trial court’s application of the enhancement factor for a previous history of criminal convictions does not offend the Sixth Amendment. *Gomez II*, 239 S.W.3d at 740.

According to the defendant’s presentence report, he had at least twenty prior convictions in addition to those necessary to establish the range. His prior convictions include violation of the sex offender registry, criminal trespass, driving on a revoked license, public intoxication, assault, casual exchange, criminal impersonation, evading arrest, aggravated kidnapping, rape, vandalism, and theft. The State argues, and we agree, that the prior criminal convictions factor alone justifies the enhancement of the defendant’s sentence. We conclude that the enhancement factor for prior criminal convictions applied by the trial court “elevated the sentences to the maximum ceiling, [and] firmly embedded the sentences in the ceiling.” *State v. Samuel D. Braden*, No. 01C01-9610-CC-00457, 1998 Tenn. Crim. App. LEXIS 213, at *24 (Tenn. Crim. App., at Nashville, Feb. 18, 1998). Because the record supports enhancement based on the defendant’s prior convictions, the defendant has not demonstrated that he is entitled to relief on this issue.

Next, the defendant argues that the trial court improperly sentenced him to consecutive sentences. Specifically, he contends that the trial court did not make the required findings in order to classify him as a dangerous offender. The State concedes that the trial court did not make the requisite findings for declaring the defendant a dangerous offender but contends that a *de novo* review would reflect that there was sufficient evidence to uphold the sentence imposed.

When a criminal defendant challenges the length, range, or manner of service of a sentence imposed by a trial court, the appellate court must conduct a *de novo* review of the record with a presumption that the sentencing determinations made by the trial court are correct. Tenn. Code Ann. § 40-35-401(d). The presumption of correctness is “conditioned upon the affirmative showing in the record that the trial court considered the sentencing principles and all relevant facts and circumstances.” *State v. Ashby*, 823 S.W.2d 166, 169 (Tenn. 1991). If the sentencing court did not

do so, then the presumption is removed, and the appellate court must review the sentence *de novo* with no presumption of correctness. *Id.*

If the “sentencing court followed the appropriate statutory procedure and imposed a lawful sentence after giving due consideration and proper weight to the factors and principles under law, and so long as the sentencing court’s findings of facts are adequately supported by the record, this court may not modify the sentence, even if actually preferring a different result.” *State v. Goodwin*, 143 S.W.3d 771, 783 (Tenn. 2004). The defendant bears the burden of demonstrating that the sentence is improper on appeal. Tenn. Code Ann. § 40-35-401, Sentencing Commission Comments; *State v. Goodwin*, 143 S.W.3d at 783.

Tennessee Code Annotated section 40-35-115 governs consecutive sentencing. The statute provides that a trial court may impose consecutive sentencing if it finds by a preponderance of the evidence that:

- 1) The defendant is a professional criminal who has knowingly devoted such defendant’s life to criminal acts as a major source of livelihood;
- 2) The defendant is an offender whose record of criminal activity is extensive;
- 3) The defendant is a dangerous mentally abnormal person . . . ;
- 4) The defendant is a dangerous offender whose behavior indicates little or no regard for human life, and no hesitation about committing a crime in which the risk to human life is high;
- 5) The defendant is convicted of two (2) or more statutory offenses involving sexual abuse of a minor . . . ;
- 6) The defendant is sentenced for an offense committed while on probation; or
- 7) The defendant is sentenced for criminal contempt.

Tenn. Code Ann. § 40-35-115(b). The trial court has the discretion to order consecutive sentencing if it finds that one or more of the required statutory criteria exist. *State v. Black*, 924 S.W.2d 912, 917 (Tenn. Crim. App. 1995).

The trial court imposed consecutive sentencing based on its determination that the defendant was a dangerous offender. If a trial court concludes that a defendant is “dangerous” under Tennessee Code Annotated section 40-35-115(b)(4), it must make two further determinations in addition to applying general sentencing principles. *State v. Imfeld*, 70 S.W.3d 698, 708 (Tenn. 2002). The court must find that an extended sentence is necessary to protect the public from further criminal conduct by the defendant, and, second, it must find consecutive sentencing to be reasonably related to the severity of the offenses. *State v. Wilkerson*, 905 S.W.2d 933, 939 (Tenn. 1995). This court may uphold consecutive sentencing if the *Wilkerson* factors can be made from the record on appeal.

Here, the defendant entered the victim’s home at night and armed himself with a steak fork from the victim’s kitchen. He went to her bedroom, held the weapon to her head, and demanded money. The victim gave the defendant what money she had on hand, and he shoved her back on the

bed. The defendant removed the victim's underwear and vaginally raped her while holding the weapon on her. The State argues that this behavior demonstrated that he had little or no regard for human life.

The State also argues that an extended sentence is necessary to protect the public from the defendant and that consecutive sentences reasonably relate to the severity of his offenses. The defendant fled the victim's home and hid in a nearby apartment. The police discovered the defendant in a bedroom hiding between the mattress and box springs of a bed. Further, according to the presentence report, the defendant has an extensive criminal record dating back to 1985. The defendant was also on probation at the time the underlying crimes were committed.

Our review reflects that the consecutive sentences imposed by the trial court were proper. The defendant meets at least three of the statutory factors that govern the imposition of consecutive sentencing: he has an extensive criminal record; he is a dangerous offender whose behavior indicates little or no regard for human life and had no hesitation about committing a crime in which the risk to human life is high; and he committed the underlying offenses while on probation. The defendant is not entitled to any relief on this issue.

Conclusion

Based on the foregoing and the record as a whole, we conclude that the evidence was sufficient to support the defendant's convictions and find no reversible error in the defendant's sentences. However, we conclude that the alternate theories for each of the defendant's multiple convictions should have been merged and we remand to the trial court on that single issue.

JOHN EVERETT WILLIAMS, JUDGE